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Supreme Court of the United States

OCTOBER TERM, 1940

No. 388

O/Y WIPU, as owner of the Finnish steamer WILJA,
Petitioner,

against

LOUIS LOUIS DREYFUS, JEAN LOUIS DREYFUS, PIERRE LOUIS DREYFUS and FRANCOIS LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & Co.,
Respondents.

REPLY BRIEF SUBMITTED ON BEHALF OF PETITIONER

EDGAR B. KRAETZER,
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JAMES McKOWN, JR.,
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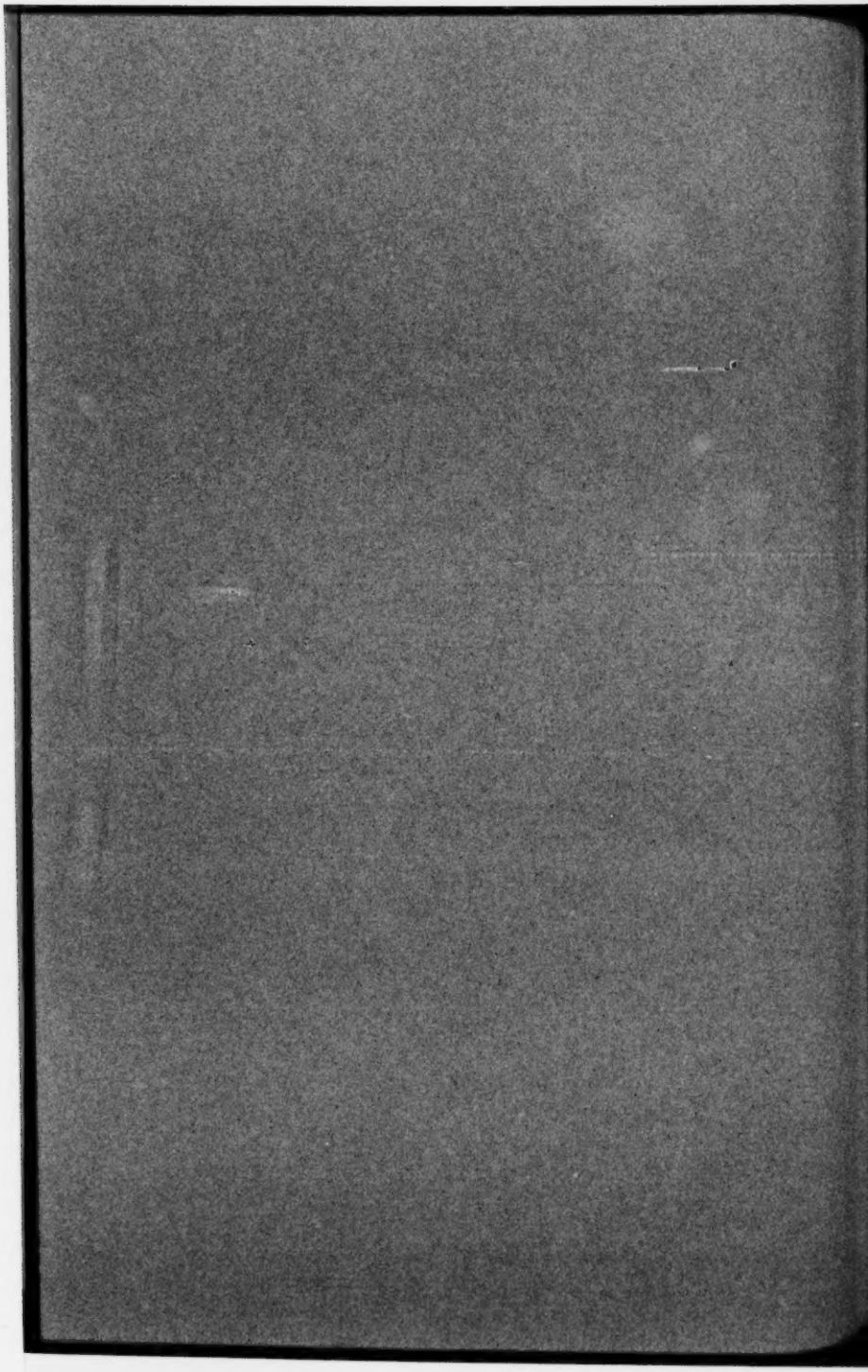

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The filing of a reply brief is necessitated by the plain effort of respondents, throughout their 48-page brief, to confuse the issues.

I

At the top of page 4 of their brief, respondents state that the SS. Wilja "never sailed to and never loaded respondents' cargo at St. Lawrence ports or any other ports." It is true that the Wilja never loaded respondents' cargo, and it is true that she never reached Montreal or any other St.

Lawrence port. She did, however, *leave New York for Montreal* (R. p. 66), sailing about noon on November 20th, but she was compelled to return to New York on the following day.

II

At the foot of page 4 of respondents' brief, the following appears:

> "Upon the motions before the District Court petitioner denied the very existence of the contract of charter sued upon (Statt, 106)."

This statement is repeated in slightly varied form and usually in italics throughout respondents' brief.* The statement that petitioner denied the existence of the contract sued upon, or alleged that the contract did not exist, is not only deliberately misleading but is, in fact, wholly incorrect. The authority cited by the respondents for their assertion (fol. 106) is found on page 36 of the record, and the words quoted by respondents have been torn from their context. The contract in suit is incorporated in Exhibit B (R. p. 29), the addendum executed at London on November 18, 1939, and in Exhibit A (R. p. 28), the original charter party signed at London on August 17, 1939, all the conditions and exceptions of which, except those modified by the addendum, were incorporated by reference into the addendum, which specifically provided (R. p. 29, fol. 87):

> "All other conditions and exceptions of charter-party remaining unaltered."

Among the conditions "remaining unaltered" was the arbitration clause. Petitioner argued in the District Court, and

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* See respondents' brief, page 6, fifth and sixth lines from bottom; page 9, line 5; page 9, lines 11 and 12; page 11, first paragraph; page 12, line 10; page 19, lines 19 and 20; page 27, lines 17 and 18; page 28, last paragraph; page 29, first paragraph; page 43, line 14; page 45, lines 2 and 3; page 45, six lines from bottom.

still asserts,* that prior to the execution of the addendum on November 18, 1939, the charter party of August 17, 1939, was not enforceable by either party, because although bearing the physical attributes of a contract, it reserved to the charterer an unqualified option to cancel the charter if and when the owner saw fit to declare lay days, but *no such argument was ever advanced or suggested by petitioner with reference to the binding agreement of November 18, 1939,* pursuant to which the Wilja started for Montreal to load the cargo contracted to be carried by that contract.

As appears from a reading of folios 104 to 106, inclusive (R. pp. 35-36), petitioner's argument was as follows:

Prior to the execution of the addendum of November 18, 1939, respondents had filed a libel for alleged breach of the charter party of August 17th, and had stated their damages at $60,000. Thereafter the addendum of November 18th was executed which provided for twice the original amount of freight. Therefore, petitioner argued that since respondents in bringing the instant suit, after the execution of the addendum, still insisted that their damages were $60,000 (R. p. 10), it must follow either that respondents were demanding security in twice the amount to which they were entitled, or, alternatively, that they repudiated the addendum, and (although every indication in the libel was to the contrary), were attempting to base a cause of action on alleged breach of the original charter party at the lower freight. Petitioner accordingly argued that either respondents' damages arose under the second contract and could only be approximately half what they claimed (and that accordingly the security demanded was grossly excessive) or, alternatively, that *if* they were seeking damages for breach of the charter party of August 17th, then the libel must be dismissed *in toto,* because that charter party was only an illusory contract upon which no action lay for failure on the part of the petitioner to perform it, whether fortuitously or otherwise. At no time has petitioner suggested in any

* See petitioner's brief, page 17.

way that following the execution of the addendum at London on November 18, 1939, there was not a valid binding contract between the parties.

III

At page 10 respondents state, in reference to petitioner's agreement to arbitrate immediately upon respondents' indicating that arbitration was desired by them, that petitioner's oral agreement "was neither mentioned in nor supported by any affidavit until approximately 77 days after it was alleged to have been made * * *." Respondents wholly fail to mention that the statement referred to was, in substance, contained in a brief served by petitioner upon respondents' counsel on the date on which the oral statement was made, and that in a second brief served on respondents' counsel on February 5th, four days later, the following appears:

> "* * * Respondent has in its brief heretofore filed and on the hearing of this motion agreed, to proceed with arbitration in London; respondent has no objection to the entry of an order dismissing the libel herein conditioned upon its appearing in arbitration proceedings in London, provided only that it has assurance that libelants will go ahead there." (See affidavits of Herbert M. Statt and James McKown, Jr., verified April 20, 1940, on file in the District Court.)

IV

At the foot of page 10 respondents complain that no request for arbitration was made by petitioner. Petitioner was not complaining of any breach of contract by respondents, and hence was under no burden to initiate arbitration proceedings. Immediately upon the respondents' stating that they were about to commence arbitration proceedings in London, petitioner agreed to appear on and proceed with these proceedings.

In *Beechwood, American Creosoting Co., Libelant,* v. *SS. Beechwood et ano.,* 1937 A. M. C. 1485 (not elsewhere reported), Judge Caffey in the Southern District of New York said of a similar contention (p. 1486):

> "The burden was on the libelant to initiate proceedings for arbitration. This the libelant has not done. There was no duty on the respondents to seek arbitration in the first instance. * * * Where the obligation to open the proceeding looking to arbitration rests on the libelant and the libelant has not sought it, obviously, as I believe, the respondents are not in 'default' with respect to procuring an arbitration. Only a refusal by the respondents to arbitrate after a request by the libelants to do so can constitute the default mentioned in Section 3. I should regard a holding otherwise as in defiance of what was ruled in the *Shanferoke* case (70 F. [2d] 297, aff'd 293 U. S. 449)."

V

At the foot of page 21, respondents state:

> "The within action was instituted in the only forum in which respondents could obtain jurisdiction over petitioner."

This statement is wholly incorrect. Petitioner is a Finnish corporation and is obviously subject to suit in Finland, which country is not at war. Furthermore, the libel alleges (R. p. 21) that the petitioner "has duly appointed agents for the transaction of its business in and about various ports in Europe." Among the agents referred to in the libel are H. Clarkson Company, Ltd., the well known London chartering firm.

The only allegation as to inability to obtain jurisdiction is contained in Article Second of the libel (R. pp. 20-21), wherein it is alleged that petitioner has no office for the transaction of business within the Eastern District of New York. Furthermore, as pointed out in our main brief, petitioner has repeatedly agreed to appear on and proceed with arbitration proceedings in London.

VI

At page 22 of respondents' brief, reference is made to the fact that the Wilja has sunk. This is wholly immaterial, since respondents have not, and have not asserted, any lien *in rem*.

VII

At pages 23-26, as Point IV, respondents raise a point which they likewise asserted in the Circuit Court of Appeals, although no mention of such a contention was made in the District Court. Respondents state (p. 26) that this matter was not passed upon by the Circuit Court of Appeals. It is true that the point was not discussed in the opinion of the Circuit Court of Appeals, but it is obvious that it must have been considered by that Court and decided adversely to respondents' contention; otherwise the Circuit Court of Appeals could not have reached its conclusion that the case is one in which the District Court had discretion as to whether or not to retain jurisdiction. The short answer to respondents' contention is that the principles of the cases cited by them under this point are wholly inapplicable to a situation, as the present, in which the Court admittedly has jurisdiction not only of the subject-matter but also of the person of the petitioner. In cases where a Court has jurisdiction of the subject-matter of a controversy, *but does not have jurisdiction of the person of the respondent,* it is true that the making of an alternative motion addressed to the merits is the equivalent of a general appearance, and hence confers jurisdiction of the person upon the Court. Despite a general appearance, petitioner here would have been free none the less to ask the Court in its discretion to decline to exercise further its admitted jurisdiction.

VIII

At page 26 respondents complain that the District Court "omitted and failed to consider the decisive, material and controlling facts." In view of the fact that the case was repeatedly argued and extensively briefed before the District Court, it can hardly be seriously contended or believed that Judge Moscowitz did not consider all of the facts. A complaint that he did not specifically find more facts than he did comes with bad grace from respondents, since, although they had ample opportunity, they chose to submit no formal findings to Judge Moscowitz. Petitioner repeats its statement that the facts found in Judge Moscowitz's opinion of January 26th were more than adequate to support the Court's conclusion of law that the case was one of which it should decline jurisdiction.

IX

At page 31, respondents cite the case of *Fairgrieve et al.* v. *Marine Insurance Company of London,* 94 Fed. 686, apparently in support of a contention that the Court may decline to exercise jurisdiction only "where for some special reason it appears to be inexpedient to exercise it." Petitioner submits that the rule is more accurately stated in the quotation from *U. S. Merchants & Shippers Ins. Co.* v. *A/S Den Norske Afrika og Australie Line,* 65 F. (2d) 392, which is cited and italicized by respondents at page 33 of their brief, that retention of jurisdiction "depends upon whether its exercise is essential to justice; whether the libelant is driven to seek it in order to secure any adequate redress at all."

X

At page 38 reference is made to the fact that the testimony of the master of the Wilja was limited to establishing the date on which the Wilja expected to sail from New York. The testimony at the hearing on December 20, 1939, at which

the master of the Wilja was called as a witness, dealt solely with the question of whether an immediate hearing of petitioner's motions was necessary. The minutes of this hearing appear in the record at pages 102 to 113, inclusive, and the most cursory examination shows that the scope of the testimony was so limited.

XI

At page 40 respondents state that "it was only *after* the District Court * * * had declined jurisdiction" that they requested and obtained the petitioner's oral agreement to arbitrate in London. This is true; but the respondents are none the less now estopped by this new agreement from refusing to arbitrate since it was confirmed in writing (*supra*, p. 4).

The District Court was asked by respondents to include in its order of dismissal a proviso

> "that respondent herein appear in an arbitration proceeding in London, *to be commenced by the libelants herein, and had in accordance with the terms of the Arbitration Clause provided for in the contract of charter* * * * or (2) In the alternative, for an order retaining jurisdiction over the within action but staying the further prosecution thereof in this Court pending the hearing and determination of an arbitration proceeding in London, *to be commenced by the libelants herein, and had in accordance with the terms of the Arbitration Clause provided for in the contract of charter*" (R. pp. 85-86; italics ours).

Irrespective of whether the contract in controversy contained an arbitration clause, the District Judge in his discretion would have been amply justified in declining to exercise jurisdiction and leaving the foreigners involved in the litigation to their remedies in other tribunals. If, as now appears to be the fact, the thought was entirely absent from respondents' minds that there was to be "an arbitration proceeding in London *to be commenced by the libelants herein*,"

it is hard to see how they can justify their appeal to the Court to include such a proviso in its order of dismissal. Respondents stated in their notice of motion (R. p. 80) in no uncertain terms their intention of commencing arbitration proceedings in London. They asked assurance that jurisdiction could be obtained of the petitioner in those proceedings. They received that assurance in unmistakable form and yet they now imply that it was never their intention to arbitrate; that the real purpose of their suit was to obtain a trial on the merits and not, as they asserted to the District Court, to obtain security under the provisions of Section 8 of the United States Arbitration Act (U. S. Code, Title 9).

Assuming, *arguendo,* that neither party, in the absence of further agreement by the other, could compel arbitration, respondents still cannot escape arbitration because they have lost, by their conduct in this case, any right which they might have had to object to arbitration.

XII

Adopting a practice that is to say the least unusual, respondents have annexed to their brief, at pages 47 and 48, photostatic copies of two letters, which they have labeled Exhibit C and Exhibit D. These are no part of the record, although respondents have very evidently endeavored to mislead the Court into thinking that they are, even though they add nothing in support of any relevant legal issue advanced by respondents. It is to be assumed that under the circumstances they will be disregarded by the Court, and accordingly no further comment will be made thereon.

Respectfully submitted,

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